ORAL ARGUMENT SCHEDULED FOR APRIL 21, 2005

No. 04-5286

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SIBEL EDMONDS,

Plaintiff–Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants–Appellees.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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SUMMARY OF ARGUMENT

Slowly but surely, the edifice of complete secrecy that the government has constructed around this case is crumbling. First, the Justice Department's own Office of Inspector General released a report that not only discusses Ms. Edmonds' termination in detail, but provides direct support for Ms. Edmonds' allegation that the FBI fired her for disclosing serious security breaches within the agency. Next, the Justice Department, rather than face judicial scrutiny of its extraordinary decision to classify *retroactively* congressional briefings and letters related to this case, instead conceded that release of those materials would in no way harm national security. The government now finds itself in the awkward position of having to demonstrate why litigation aimed at establishing precisely what the Inspector General has already publicly concluded will threaten national security.

These developments only underscore what Ms. Edmonds argued in her opening brief: that there was simply no basis for terminating this litigation at the pleading stage, and that the district court erred in accepting at face value the government's sweeping assertion of the state secrets privilege. Ms. Edmonds must be given the opportunity to proceed with nonsensitive discovery and to present nonprivileged evidence in support of her claims. Should this Court hold otherwise and ratify the dismissal of Ms. Edmonds' case at the pleading stage, it will be all too easy for the government to deploy the state secrets privilege to avoid embarrassment or accountability any time that sensitive information is implicated.

In short, Ms. Edmonds is entitled to her day in court.

ARGUMENT

I. The government can no longer hide behind the state secrets privilege.

One day after Ms. Edmonds filed her opening brief in this appeal, the Justice Department finally released to the public an unclassified summary of the Inspector General's report on Ms. Edmonds' allegations.[1] The Inspector General resoundingly concluded that the FBI had retaliated against Ms. Edmonds for reporting serious security breaches, stating that "many of her allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, *the most significant factor in the FBI's decision to terminate her services.*" IG Report at 31 (emphasis added).[2] One week ago, the Justice Department also finally conceded that specific information contained in congressional correspondence that detailed FBI statements confirming many of Ms. Edmonds' allegations was not in fact classified, as the government had previously insisted. *See* R. Jeffrey Smith, *Access to Memos is Affirmed*, Wash. Post, Feb. 23, 2005, at A17 (reporting that the "Justice Department has backed away from a court battle over its authority to classify and restrict the discussion of information [related to Sibel Edmonds] it has already released."). It is now even more unreasonable for the

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[1] A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS (January 2005; Unclassified Summary), available at http://www.usdoj.gov/oig/igspecr1.htm (hereinafter "IG Report").

[2] The Inspector General conducted a lengthy and thorough investigation into whether Ms. Edmonds was retaliated against for her whistleblower activity, and whether the FBI appropriately handled her allegations; it did not investigate the ultimate truth of her whistleblower allegations. The Inspector General conducted interviews with more than 50 FBI employees and contractors, and Justice Department officials. The report was completed in July 2003, and immediately classified by the Justice Department. The unclassified summary was released only after two years of negotiations between U.S. Senators, the Inspector General, Ms. Edmonds and her attorneys, and the Justice Department. IG Report at 3, n.1. The unclassified version "summarizes the core of the [full] OIG report." *Id.* at 3.

government to continue to hide behind the state secrets privilege in this case given these newly disclosed facts and the evidence discussed in Ms. Edmonds' opening brief. *See* Edmonds Br. at 27-37.

The government nevertheless continues to rely heavily on information provided in secret, *ex parte*, declarations to the district court, to support its argument that the state secrets privilege warrants dismissal of the case. Of course, Ms. Edmonds cannot possibly determine whether any evidence discussed in those declarations has now been disclosed in the IG report or in congressional briefings, or whether the declarations indeed discuss material that would harm national security if disclosed. But regardless of its content or whether it in fact involves state secrets, the government's secret evidence is unnecessary to decide the case, given the breadth of nonprivileged evidence available to support Ms. Edmonds' claims and negate any defense offered by the government.

The Inspector General's findings corroborate Ms. Edmonds' version of the events surrounding her termination. The Inspector General found that Ms. Edmonds raised serious allegations of espionage that were "supported by either documentary evidence or witnesses other than Edmonds." IG Report at 10. The FBI's investigation of those allegations was "significantly flawed." *Id.* at 15. The Inspector General emphasized that, "as demonstrated by the espionage of former FBI Agent Robert Hanssen, the FBI must take seriously allegations suggesting security breaches, even if the evidence is not clear-cut." *Id.* at 12 n.13.

Rather than thoroughly investigate these allegations, the FBI instead began investigating Ms. Edmonds for security breaches, of which Edmonds was ultimately cleared. Soon after Ms. Edmonds began reporting her concerns, a high level manager

began inquiring about the FBI's options with respect to ending contracts with linguists. *Id.* at 21. By March 20, 2002, Ms. Edmonds' supervisor officially recommended that Ms. Edmonds' contract be terminated, and repeatedly mentioned her reports of misconduct as a reason for the decision. *Id.* Ms. Edmonds was terminated two days later. The Inspector General found that "rather than investigate [Ms.] Edmonds' allegations vigorously and thoroughly, the FBI concluded that she was a disruption and terminated her contract." IG Report at 11. Shortly thereafter, more allegations of security violations were lodged against Ms. Edmonds. However, an internal analyst noted in a memorandum described by the Inspector General that she was not fired for security reasons and her clearance had not been revoked. *Id.* at 23.

Based on this evidence, employing an analysis that is almost identical to a First Amendment retaliation analysis,[3] the Inspector General found that the FBI fired Ms. Edmonds because of her whistleblower activity. IG Report at 31, 35; *see also* Edmonds Br. at 31-35. The IG report would be admissible as both direct and circumstantial nonprivileged evidence to support Ms. Edmonds' core First Amendment claim. *See* Edmonds Br. at 31-35 (discussing proof required to establish a successful First

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[3] *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983). The Inspector General considered whether Ms. Edmonds had been retaliated against under the standards of the FBI whistleblower regulations. Much like a First Amendment retaliation claim, the whistleblower retaliation inquiry asks whether an employee's disclosure is "protected," whether the employee "reasonably believe[d] the disclosure evidenced" some kind of violation, mismanagement, abuse of authority or danger to the public, "whether the 'disclosure was a contributing factor' in the termination decision." IG Report at 30. If a whistleblower establishes those elements, the burden shifts to the FBI to show that "it would have taken the personnel action against the complainant in the absence of protected disclosure." *Id.*

Amendment retaliation claim).[4] The Inspector General's findings establish that Ms. Edmonds' allegations were reasonable and reported in good faith, and that her disclosures were *the* most substantial motivating factor behind her termination. IG Report at 31. The Inspector General expressed its further concern that "[b]y terminating Edmonds' services, in large part because of her allegations of misconduct, the FBI's actions also may have the effect of discouraging others from raising concerns." *Id.* at 32.

The IG report also provides nonprivileged evidence that the government had no legitimate interest in silencing Ms. Edmonds, let alone an interest that outweighed Ms. Edmonds' interest in engaging in constitutionally protected speech. *See Foster v. Ripley*, 645 F.2d 1142, 1148 (D.C. Cir. 1981) (employee's "interest is entitled to more weight when [employee] is . . . acting as a whistleblower"). Indeed, it appears that the only interest the FBI had was to prevent Ms. Edmonds' serious allegations – allegations that would embarrass the FBI – from being made public.

Most importantly, the Inspector General found that the government could not establish a valid defense to Ms. Edmonds' retaliation claim. *See In re United States,* 872 F.3d 472, 476 (D.C. Cir. 1989) (dismissal of suit appropriate only if the government is incapable of proving a "*valid* defense" with nonprivileged evidence) (emphasis added).

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[4] Fed. R. Evid. 803(8)(C) provides that "Records*,* reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," are not "excluded by the hearsay rule." *See also United States v. A.T. & T., Co.,* 498 F. Supp. 353 (D.C. Cir. 1980) (holding that public records containing factual findings resulting from an internal agency investigation were admissible as an exception to the hearsay rule, so long as they were trustworthy); *Higbee v. Billington*, 293 F. Supp. 2d 132, 133 (D.D.C. 2003) (noting that the findings of administrative agencies as a result of an investigation of employees' complaints are admissible, so long as they are trustworthy).

The Inspector General found entirely unpersuasive the FBI's claim that it had legitimate reasons for firing Ms. Edmonds, and that it would have fired her notwithstanding her whistleblower activity. The Inspector General expressly determined that the FBI could not show "that at the time the decision was made it would have terminated Edmonds' contract absent her disclosures." IG Report at 30. Rather, the Inspector General found that Ms. Edmonds had not been fired because the FBI did not need her services, nor because she was a security threat, but because she was perceived as having a "disruptive effect" due to her whistleblower activity. *Id.* at 30-31.

Additionally, the IG Report's discussion of the underlying evidence strongly suggests that in addition to the circumstantial evidence described in Ms. Edmonds' opening brief, Edmonds Br. at 33-34, Ms. Edmonds could obtain additional nonprivileged evidence through discovery to prove her claims or negate purported defenses. For example, the unclassified IG summary quotes directly from FBI emails, reports, and memoranda, all of which support Ms. Edmonds claims.[5] The Inspector General's recitation of the timeline of events, itself, is important circumstantial evidence that Ms. Edmonds was fired in close temporal proximity to her whistleblower activity. *See* Edmonds Br. at 33. The capacity to pull information from reports or testimony and discuss them thoroughly in an unclassified manner suggests that at least parts of those

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[5] *See, e.g.,* IG Report at 15, n.15 (quoting email written by the Language Supervisor); *id.* at 16 (quoting an email written by the Language Administration and Acquisition Unit); *id.* (quoting an Electronic Communication written by the Language Supervisor concerning Edmonds); *id.* at 17 (quoting testimony of FBI manager); *id.* (quoting Security Officer's request for polygraph examinations); *id.* at 20 (quoting what appears to be testimony of FBI manager); *id.* at 21 (quoting an Electronic Commuication recommending Ms.Edmonds' termination, which included reference to the impression that Ms. Edmonds was using her whistleblower status as a "club" against her supervisors); *id.* (quoting final Electronic Communication recommending termination).

documents are nonprivileged, and thus could be disentangled from any potentially privileged information during discovery. *See Ellsberg v. Mitchell,* 709 F.2d 51, 73 (D.C. Cir. 1983) ("whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter"); *see also* Edmonds Br. at 26.

The information provided by the FBI in unclassified briefings to Congress and memorialized in letters that the government now agrees can be provided to the public offers further nonprivileged support for Ms. Edmonds' claims. At those briefings, the FBI confirmed Ms. Edmonds' allegations of possible espionage, noting that her co-worker had "failed to translate at least two communications reflecting a foreign official's handling of intelligence matters," and had "unreported contacts" with that foreign official. J.A. 68-71, 83-85, 87; *see also* Edmonds Br. at 20. The FBI also confirmed other security breaches, including the unauthorized use of a language "monitor" rather than a contract linguist to translate sensitive material derived from the Guantanamo Bay detention center. *Id.* That the FBI itself confirmed Ms. Edmonds' allegations is strong nonprivileged evidence that her speech was reasonable and her allegations reported in good faith. *See* Edmonds Br. at 33-34.

It is now clearer than ever that Ms. Edmonds has a strong retaliation case that can be decided on the basis of unclassified evidence. The recent disclosures in the IG report and unclassified congressional briefings wholly undermine the government's insistence that the case cannot be litigated without jeopardizing state secrets. Yet the government hardly mentions these developments in its brief, noting only that the IG Report and disclosures to Congress do not justify "further disclosures" or waive the state secrets

privilege. Govt. Br. at 29 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990)). The government misses the point. Regardless of whether any discrete pieces of evidence remain entitled to the privilege (which is far from clear), the case must be remanded to allow Ms. Edmonds to proceed with nonprivileged discovery and to submit the growing amount of nonprivileged evidence to support her claims and refute any defenses proffered by the government. *See* Edmonds Br. at 19-22.

II. Ms. Edmonds must be given the opportunity to proceed with nonsensitive discovery and to present nonprivileged evidence to support her claims.

As Ms. Edmonds explained in her opening brief, the state secrets privilege is a common law evidentiary privilege designed to shield disclosure of legitimately sensitive evidence, not to broadly justify dismissal of a lawsuit prior to discovery. Edmonds Br. at 11-17. The district court recognized, and the government concedes, that dismissal based on the state secrets privilege is "draconian." J.A. 32; Govt. Br. at 11; *see also In re United States*, 872 F.2d at 477. The government nevertheless fundamentally misconstrues the case law to urge dismissal in this case. It insists that dismissal is appropriate because the very subject matter of Ms. Edmonds' allegations is a state secret, or because the privileged information goes to the core of the case. The first argument is flaty wrong, and the second is premature.

First, the government attempts to expand the line of cases that derive from *Totten v. United States*, 92 U.S. 105 (1875), and that authorize dismissal where the very subject matter of the case is a state secret. Edmonds Br. at 17-22. The government claims that the "nature of [Ms.] Edmonds' duties" are state secrets. Govt. Br. at 9. But Ms. Edmonds' duties as an FBI translator plainly are not state secrets, and are irrelevant to her claims. FBI agents and translators are law enforcement personnel, not covert government

agents. The unclassified IG summary contains a great deal of information about the structure of the FBI translation unit, the nature of its work, and the distinctions between the work of contract monitors and contract linguists. IG Report at 3-7; *see also* THE FEDERAL BUREAU OF INVESTIGATION'S FOREIGN LANGUAGE PROGRAM – TRANSLATION OF COUNTERTERRORISM AND COUNTERINTELLIGENCE FOREIGN LANGUAGE MATERIAL, U.S. Dept. of Justice, Office of the Inspector General Audit Division (July 2004, Unclassified Executive Summary), available at http://www.usdoj.gov/oig/audit/FBI/0425/index.htm (hereinafter "IG Audit Report") (discussing in detail FBI translators' role in "monitor[ing] FISA lines on a near-live basis," internal goals with regard to translation of "Al Qaeda FISA audio," structure of the Language Services Section, and translation priorities and work distribution). The government simply cannot succeed in transforming the FBI into a covert agency to support its argument for dismissal based on state secrets. *See also* Edmonds Br. at 19-20.

Similarly, the government contends that all of the events surrounding Ms. Edmonds' termination, the "contents of any system of records" maintained by the FBI, "the identity of FBI employees," and the identity of "others with access to such records," are state secrets. Govt. Br. at 19. That assertion is undermined by the sheer amount of factual detail found in the IG Report and elsewhere about the structure of the translation unit, FBI computer systems, the FBI response to security breaches, and the substance of Ms. Edmonds' allegations. Again, the government tries to argue that the disclosure of some facts publicly does not justify "further disclosures." The point is that the massive amount of information available casts significant doubt on the proposition that all of the information falling within those categories qualifies as state secrets. The identity of FBI

agents and their duties (let alone administrative staff) are routinely exposed. *See* Edmonds Br. at 29-31.

The Supreme Court's recent unanimous decision in *Tenet v. Doe*, --- U.S. ---, 2005 WL 473682 (March 2, 2005), only strengthens Ms. Edmonds' contention that her case is categorically distinct from cases dismissed because the very subject matter of the dispute constitutes a state secret. Indeed, the Court in *Tenet* expressly distinguished the "*evidentiary* 'state secrets' privilege" from the rule of *Totten,* "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret," requiring that the case "be dismissed *on the pleadings without ever reaching the question of evidence*." *Tenet,* 2005 WL 473682, at *4-5 (internal citations and quotations omitted) (emphasis in original). That the *Totten* rule has no bearing on Ms. Edmonds' case is underscored by the Court's discussion of *Webster v. Doe,* 486 U.S. 592 (1988), an employment discrimination case brought by a CIA employee. The Court explained:

> [T]here is an obvious difference, for purposes of *Totten,* between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy. Only in the latter scenario is *Totten'*s core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed. That is why the CIA regularly entertains Title VII claims concerning the hiring and promotion of its employees . . . .

Tenet, 2005 WL 473682, at *5. Here, as in *Webster,* there is no basis for the government's claim that litigation concerning an employment dispute should be terminated at the pleading stage.

Second, the government argues that dismissal is warranted here because privileged material "is central 'to the very question upon which a decision must be rendered,'" Govt. Br. at 16 (quoting *Bareford v. General Dynamics Corp.,* 973 F.2d 1138, 1143 (5th Cir. 1992)), the "core allegations implicate the classified information that

has been removed from the case," Govt. Br. at 21, and a trial would "inevitably lead to a significant risk that highly sensitive information would be disclosed," Govt. Br. at 17 (quoting *Bareford,* 973 F.2d at 1144). But the government's argument that privileged evidence is relevant and necessary to the claims and defenses is pure speculation at the pleading stage. This Court has properly recognized that lower courts must first allow nonsensitive discovery and the submission of nonprivileged evidence before concluding that privileged information is necessary to decide the case. *See In re United States,* 872 F.2d at 476; *Ellsberg,* 709 F.2d at 65 n.55; *Molerio v. FBI,* 749 F.2d 815, 822 (D.C. Cir. 1984). The government offers no controlling authority to justify premature dismissal of this suit. In fact, neither of the cases cited by the government was dismissed at the *pleading* stage. Govt. Br. at 16. In both *Bareford* and *Fitzgerald v. Penthouse Int'l, Ltd*, 776 F.2d 1236 (4th Cir. 1985), plaintiffs were allowed to engage in discovery and to present nonprivileged evidence to the court. *Bareford,* 973 F.3d at 1142; *Fitzgerald,* 776 F.2d at 1238.

At this early stage of the case, the district court simply had no way of knowing which allegations were even disputed, or whether either party had a compelling need to rely on state secrets. *See supra* Section I; Edmonds Br. at 15, 24-25.[6] It makes little sense to discuss the effect of "removing privileged evidence" from the case, as the government does repeatedly, when it is unclear whether that evidence will be necessary or even relevant. *See, e.g.,* Govt. Br. at 7, 21, 27. The district court's one-sided reliance

[6] It is now apparent that the government, at the very least, must be required to answer Ms. Edmonds' complaint. *See* Edmonds Br. at 24-25. Indeed, the government will be hard pressed to deny that Ms. Edmonds was fired in retaliation for her whistleblower activity, in light of the IG report and its own unclassified admissions to Congress.

on defendants' secret declarations denied Ms. Edmonds her day in court. Rather than accept the government's argument that entire "categories of information" relevant to the case are privileged, Govt. Br. at 24, the district court should have required the government to assert the privilege on an "item-by-item" basis. *In re United States,* 872 F.2d at 478.[7] Especially given the IG report and the now-unclassified briefings to Congress, there is ample evidence to show that the case could be decided without relying on privileged information. *See supra* Section I; *see also* Edmonds Br. at 32-37. The government studiously avoids any thorough discussion of Ms. Edmonds' specific claims or the evidence already available to support or negate them. It continues to imply that the court would need to litigate the truth or falsity of Ms. Edmonds' whistleblower allegations, which may involve sensitive information. Govt. Br. at 19-20. But as discussed in Ms. Edmonds' opening brief, Ms. Edmonds' claims do not require litigation of truth or falsity. Edmonds Br. at 29-30, 33-34, 36. Similarly, the Inspector General was able to conclude that the FBI had retaliated against Ms. Edmonds without having to determine whether her allegations were true.

As this Court has held, it is flatly improper for a district court to dismiss a case "merely on the basis of [the government's] unilateral assertion that privileged information lies at the core of th[e] case." *In re United States*, 872 F.2d at 477. A court is in a much better position to determine a litigant's need for privileged information when

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[7] The district court is perfectly capable of sifting through the evidence. As the Supreme Court noted in *Webster*, "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." 486 U.S. at 604.

the privilege is asserted during discovery on an item-by-item basis, rather than as a blanket assertion to urge dismissal before defendants file an answer. Thus, the district court's cursory analysis that Ms. Edmonds' case could not be litigated was clearly improper in the absence of any opportunity for Ms. Edmonds to engage in nonprivileged discovery or to submit nonprivileged evidence. Edmonds Br. at 23-27. Similarly, the court was premature in concluding based only the government's secret musings about what evidence *might* be relevant that it could not disentangle sensitive information from nonsensitive information. Edmonds Br. at 26.[8]

Ultimately, the government urges an interpretation of the state secrets privilege that would authorize dismissal of a lawsuit at the pleading stage based only on the government's one-sided belief that a case *might* implicate state secrets. This Court should reject that rule, continue to allow parties to litigate claims using nonprivileged evidence, and authorize dismissal only in the rare circumstance where litigation *in fact* jeopardizes state secrets. This is not such a case.

III. It is far from clear that the government has acted for good reasons in invoking the privilege.

A simple recitation of the government's behavior over the course of this dispute calls into question the motivation behind its invocation of the state secrets privilege. Rather than act out of genuine concern for national security, the government appears to

[8] The government distorts Ms. Edmonds' argument with respect to consideration of alternatives to dismissal. Edmonds Br. at 37-39. Ms. Edmonds is not arguing that alternatives must be considered so that the litigation can proceed with properly *privileged* evidence. Rather, before considering whether dismissal is the only remedy – especially in light of a premature and overbroad claim of privilege – a court must consider, at the very least, whether tools such as protective orders or seals can help facilitate discovery of *nonprivileged* evidence, to safeguard against disclosure of potentially related, sensitive information.

have acted with an eye toward tactical advantage and to protect the FBI from public embarrassment.

The government terminated Ms. Edmonds after she tried to raise important national security threats with her managers, the FBI's Office of Professional Responsibility, the Inspector General, and Congress. The government leaked information to the press, discrediting Ms. Edmonds' whistleblower allegations, and suggesting that Ms. Edmonds herself was a security risk. J.A. 42-43, 59-60. Meanwhile, the FBI was providing unclassified briefings to Congress in which it confirmed her core whistleblower allegations. J.A. 83-85, 73-74, 108-09, 200-01.

Soon thereafter, in response to Ms. Edmonds' lawsuit, the government invoked the state secrets privilege in an effort to dismiss her case before it would be compelled to answer, provide discovery, or face public accountability. J.A. 55-57. When it realized that the unclassified information provided to Congress undermined its privilege claim, the government moved to classify it retroactively. J.A. 200-01. The government also used the privilege to prevent Ms. Edmonds from testifying in another lawsuit brought on behalf of the victims of the September 11 terrorist attacks. *See Burnett v. Al Baraka Investment & Dev. Corp.*, 323 F.Supp. 2d 82 (D.D.C. 2004).

In the same month that the government convinced the district court to dismiss Ms. Edmonds' suit, the Inspector General concluded its investigation and found that the FBI had retaliated against Ms. Edmonds. IG Report at 31. Although the Department of Justice immediately classified this report, FBI Director Mueller openly quoted from it in an unclassified letter to a number of Senators. *See* Letter from FBI Director Mueller to Senator Hatch, dated July 21, 2004, at 1 (available at http://www.pogo.org/m/hsp/hsp-

040721-Mueller.pdf). Nonetheless, the Justice Department was successful in hiding the Inspector General's findings from the public for approximately two years, when it finally authorized the Inspector General's release of an unclassified summary. IG Report at 3, n.1. This unclassified summary was conveniently released one day *after* Ms. Edmonds filed her opening brief in this Court. The government continues to oppose the release of the full version of the report, and has only recently released a heavily redacted copy as part of a separate FOIA lawsuit brought by Ms. Edmonds.

Finally, while it continues to rely on overbroad categories of information to justify invocation of the states secret privilege in this lawsuit, on the eve of having to defend its retroactive classification of information about its congressional briefings in another lawsuit, the government capitulated. It now agrees that letters written by United States Senators recounting information provided by the FBI concerning Ms. Edmonds – material it has argued comes under the umbrella of state secrets in this litigation – can be released to public. *See* R. Jeffrey Smith, *Access to Memos is Affirmed*, Wash. Post, Feb. 23, 2005, at A17.

Ultimately, the most harmful aspect of the government's excessive claim of secrecy in this litigation is its unlimited reach. Edmonds Br. at 39-42. As Ms. Edmonds argued in her opening brief, if her status as an FBI translator, her security clearance, and the classified nature of her day-to-day work may be invoked to urge dismissal of litigation pursuant to the state secrets doctrine, then many thousands of government employees may find themselves similarly deprived of a judicial forum should the government, for whatever reason, claim the privilege. Ratification of the government's position in this case would essentially remove the courts as a check and balance on

executive branch actions when a claim of national security is made. But that is emphatically not the law. *See, e.g., Hamdi v. Rumsfeld,* 124 S. Ct. 2633, 2646-50 (2004). As the Court noted there, "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his [dismissal] by his government, simply because the Executive opposes making available such a challenge." *Id.* at 2650.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Ms. Edmonds' opening brief, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,

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